PART III

Democracy in the Social Democratic Constitution

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The Law of Electoral Democracy: Theory and Purpose

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This chapter explores the question of 'theory' within the law of electoral democracy, by considering what it would mean for such a theory to exist given the contested nature of democracy itself. The chapter begins with a brief survey of the terms in question, including the emergence of this area of law as a field of study and its under-theorised state. It is quickly shown that, outside of a narrow and minimalist conception of a free election as one where votes are cast and counted, there is little agreement on the norms that should determine the law in this area, even on some fundamental concrete questions.

Normative coherence however can be demonstrated within competing approaches to the law. A social democratic theory of law is seen to provide salutary reminders. Reminders that democratic politics is collective more than individualist and that electoral democracy is not the whole of democracy. Within that tradition, the distinctive contribution of Keith Ewing to political finance – which he configures as party finance, and his defence of labourism within that – is discussed. Finally, a four-sided functionalist account of the purposes of the law is then offered. The aim of the functionalist account is to show that whilst normative approaches may be sharply contested, we are not lost at sea: theory can help set the parameters of the ongoing debate over the shape of the law.

I. Electoral Law: Its Scope and Intellectual History

A. Definitions

The law of electoral democracy encompasses the law and institutions governing representative elections (at whatever level), political parties, political finance and referendums. As a commonplace shorthand, 'electoral law' will be used in what follows. Occasionally, jostling for attention, people have tried on the term 'the law of democracy'.[1] But that is either too grandiose or too diffuse. Even to proponents of parliamentarianism and popular sovereignty,

[1] Eg, S Issacharoff et al, *The Law of Democracy: The Legal Structure of the Political Process*, 5th edn (New York, Foundation Press, 2016).

electoral democracy may be the pinnacle, but it is just the pinnacle of an iceberg.[2] For thoroughgoing social democrats such as Keith Ewing, electoral democracy is nestled within a wider constitutional project of economic and social democracy marked by industrial and liberation movements.[3]

By electoral law 'theory', I mean primarily to explore questions about 'purpose'. Purpose as telos, in the sense of prescriptive or normative aims. But also, especially later in the chapter, purpose in the more descriptive sense of functions of the law.

B. A Brief Intellectual History[4]

It is commonplace to claim that electoral law only emerged as an area of study in its own right in the past three decades. But there has been electoral law since time immemorial: in statute since at least 1275 in England.[5] And, for all the proliferation of books on electoral law lately, across common law domains such as the US,[6] UK,[7] and Australia,[8] the field still pales compared to the Victorian era. In the nineteenth century, the Great Reform and electoral corruption questions generated more, and more contentious, case law, practitioner works, and parliamentary and public interest in reform than exists today.

What then does it mean to say that electoral law has emerged as a field in recent decades? Two things are implied. One is about modernity. The Victorian era was a long transitional moment: representative democracy did not truly take off until full female suffrage and the emergence of strong parties in the first few decades of the twentieth century. The other implication is that electoral law had to emerge from the shadow of constitutional law. It has done so in two senses. In an existential sense: electoral law is not just a dusty prelude to parliamentary or legislative studies. And in a methodological sense: electoral law is not determined by a few abstract constitutional principles. It has an 'affinity with' but 'separable

[2] KD Ewing, 'Democratic Socialism and Labour Law' (1995) 24 *Industrial Law Journal* 103, 105–06.

[3] KD Ewing 'Jeremy Corbyn and the Law of Democracy' (2017) 28 *King's Law Journal* 343.

[4] For a potted history in the US see ED Mazo, 'Introduction: The Maturing of Election Law' in JA Douglas and ED Mazo, *Election Law Stories* (New York, Foundation Press, 2016) 7–11.

[5] Section 5 of the first Statute of Westminster (3 Edw I) is an edict that no-one 'by force of arms, nor by malice, or menacing shall disturb any to make free election'.

[6] DH Lowenstein et al, *Election Law: Cases and Materials*, 6th edn (~~North Carolina~~, Carolina Academic Press, 2017); S Issacharoff et al (n 1); MR Dimino et al, *Voting Rights and Election Law*, 2nd edn (~~North Carolina~~, Carolina Academic Press, 2015); JA Gardner and G Charles, *Election Law in the American Political System*, 2nd edn (New York, Wolters Kluwer, 2017); EB Foley et al, *Election Law and Litigation: The Judicial Regulation of Politics* (New York, Wolters Kluwer, 2014). There are even supporting texts in the form of a primer and a casebook, respectively: DP Tokaji, *Election Law in a Nutshell*, 2nd edn (~~Minnesota~~, West Academic, 2016) and MR Dimino et al, *Understanding Election Law and Voting Rights* (~~North Carolina~~, Carolina Academic Press, 2017).

[7] HF Rawlings, *Law and the Electoral Process* (London, Sweet & Maxwell, 1988); N de Silva and R Price, *Parker's Law and Conduct of Elections* (London, LexisNexis, 1996); R Blackburn, *The Electoral System in Britain* (London, Macmillan, 1995); B Watt, *UK Election Law: a Critical Examination* (London, Glass House Press, 2006). On specific sub-fields see KD Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Oxford, Hart Publishing, 2007) and C Morris, *Parliamentary Elections, Representation and the Law* (Oxford, Hart Publishing, 2012).

[8] G Orr, *The Law of Politics: Elections, Parties and Money in Australia*, 2nd edn (Sydney, The Federation Press, 2019). On specific sub-fields see J Tham, *Money Politics: The Democracy We Can't Afford* (Sydney, UNSW Press, 2010) and A Gauja, *Political Parties and Elections: Legislating for Representative Democracy* (Farnham, Ashgate/Routledge, 2010).

and unique character' from constitutional law.[9] Elections are steeped in statutory law and administration, the affairs of parties and associations governed by agreements and anti-discrimination law, and a residue of common and parliamentary law dealing with issues as diverse as defamation and disputed election returns.[10] By 2010 a leading US scholar could confidently state that election scholarship had 'declared [its] independence from constitutional law in a bloodless revolution'.[11]

C. Theorising Electoral Law

Opening his book *Election Law and Democratic Theory*, David Schultz observed that 'election law is an endeavour in search of a political theory'.[12] This echoes Samuel Issacharoff's quip that that the myriad rules that govern elections have 'all the allure of city council debates on garbage pick-up routes, with few of the immediately observable benefits'.[13] Issacharoff was being self-deprecating (he has spent half a lifetime immersed in the field). The broader point is that in an under-theorised realm we risk losing the forest for the trees.

Befitting a political scientist who sees election law as mired in the 'parochialism' of 'case law and doctrine', Schultz seeks to connect a 'rudderless' law to democratic theory.[14] Being from the US, his account is embedded in a culture that sees electoral law contentions in terms of 'the answers provided by the Supreme and other courts'.[15] Such appellate-courtitis is a long-standing feature of a constitutional Bill of Rights and a politicised judiciary. Regardless of disciplinary background or national context however, Schultz's broad complaint holds water. The field of electoral law may have 'declared its independence from constitutional law', but at the cost of being accused of disintegrating into technicalities.

The search for overarching, guiding principles however, may prove elusive. We could seek to induce a 'theory' of election law, from the raw matter of legislative rules, institutional practices and customs, and case law. But there is a morass of such material, and even the more prominent sources like appellate court opinions are episodic and confined. Alternatively (as Schultz suggests) we could seek to deduce principles from democratic theory, and see constitutional, statutory and administrative law in the area as nested within ~~that~~ crucible of political philosophy.[16]

Such a deductive process however founders on one inescapable rock. There is no agreed or agreeable conception of democracy, or even electoral democracy. To see this one look no further than the ideal of 'representation', on which representative democracy rests.

[9] H Green, 'Fixing Democracy's Rules: Statutes and Elections in the Constitution' (2017) 28 *King's Law Journal* 173, 174.

[10] This is obvious in the UK and NZ where constitutional law is subsumed within public law, but is hardly less true elsewhere since few written constitutions seek to set electoral law in stone.

[11] HK Gerken, 'Keynote Address: What Election Law has to Say to Constitutional Law' (2010) 44 *Indiana Law Review* 7, 7.

[12] D Schultz, *Election Law and Democratic Theory* (Burlington, Routledge/Ashgate, 2014) 1.

[13] S Issacharoff, 'The Constitutional Logic of Campaign Finance Regulation' (2009) 36 *Pepperdine Law Review* 373.

[14] Schultz (n 12) 38. He complains (at 43) of 'rulings [that look as if they] are simply edicts'.

[15] Schultz (n 12) 1.

[16] Schultz (n 12) 270–71.

Beyond vaguely tautological, even Heideggerian phrases such as 'representation means making present that which is absent', all Hannah Pitkin's classic work *The Concept of Representation* could do was reveal the multiple, often competing, conceptions of what it might mean to be a 'representative' in a plural society.[17]

And indeed, within election studies we find a singular lack of agreed metrics, outside one basic aspect. That aspect – the exception to the rule – involves a fairly minimalist conception of the catch-phrase 'free and fair elections'. As Bill Mackenzie observed, in his groundbreaking *Free Elections*, that term boils down to the principle that 'the election depends on the voters' choice'.[18] Elections should consist of a ballot that is tolerably open to a variety of candidates or parties, where everyone entitled to vote can do so free of intimidation, and all votes are counted. To say this is a technocratic imagining of elections as an aggregative contest, administered impartially, is not to understate its importance. Many countries that aspire to democratic status (including parts of the US) struggle with voter suppression, polling day chaos and so on. Mackenzie concluded his search for generalisable principles with the warning:

> There is no right way of conducting elections, but there are a number of ways which are clearly wrong: wrong in the logical sense that they apply the machinery of elections to negate the declared objects of the machinery.[19]

To adapt a medical metaphor, there is no ideal healthy electoral democracy, rather there are many pathologies that may need to be treated in practice.

II. A Social Democratic Electoral Law?

Before exploring the interaction of social democratic thought with electoral law we might reflect on its boundaries. Social democracy is not the same as democratic socialism; flipping the adjective and noun matters. Ewing's second major work on political finance opens with this breath-catching epigraph:

> Wealth is almost invariably selfish and lacking in moral principle. Its interests are often diametrically opposed to sound public policy.[20]

This could be a cri de coeur of democratic socialism. It goes beyond the standard process-focused view that wealth in elections needs regulating lest it corrode democratic process by tilting campaigns and legislators against the egalitarian spirit of one person, one-vote. It expresses a deeper substantive aversion to the interests of wealth per se.

[17] H Pitkin, *The Concept of Representation* (Berkeley, University of California Press, 1967). 'There are many views of what fair representation is – geographic representation, descriptive representation, ideological or party political representation': The ACE Electoral Knowledge Network, 'Electoral Systems: Guiding Principles' <aceproject.org/ace-en/topics/es/introduction/es20>. This is not to say that we cannot chart, historically and sociologically, the evolution of different forms of representation: see, eg, B Manin, *The Principles of Representative Government* (New York, CUP, 1997).

[18] WJM Mackenzie, *Free Elections* (London, Allen & Unwin, 1958) 12.

[19] Mackenzie (n 18) 169.

[20] KD Ewing, *Money, Politics and Law: A Study of Electoral Campaign Finance Reform in Canada* (Oxford, OUP, 1992) v.

Social democracy on the other hand is a less demanding philosophy than democratic socialism. (Compare John Rawls vacillating between 'market socialism' and 'property-owning democracy' in his final 'restatement' of his theory of justice).[21] Whilst lacking democratic socialism's concern for equality of outcomes, it goes beyond the welfare liberal's concern with enhancing equal opportunity of individuals. Social democrats thus share with democratic socialists a distaste for liberalism's reduction of the world to individuals.[22] They recognise that humans are embedded in groups and that the social whole is not blindly evolving through competitive forces but is a vehicle for enhancing the common good. Admittedly, the forms of human flourishing are diverse, so that there is not a single conception of 'the good life'. Yet, regardless of whether 'democracy' is used adjectively or as a noun, the two philosophies share a creed: electoral democracy must seek to underpin forms of representative practice that recognise the connectedness and equal worth of everyone.[23]

A. Purpose as Norms: Concretising the Search for Guiding Principles

To flesh out the quest for electoral law theory, we need to concretise the topic. To do this, let us briefly consider three basic and perennial questions in electoral democracy. These are: the franchise, in the sense (a) who votes, and (b) what a vote is worth; plus (c) the voting system. I have chosen these as they are first order issues of the sort that are often thought to have been definitively settled a century ago. But, as we shall see, they are in significant part still normatively open and contested.

i. Who Votes

It's now an axiomatic principle of liberal democracy that that the suffrage should be universal. Of course it has not always been that way: chartists and other social democrats had to win that battle in the nineteenth century against conservative forces. The latter feared 'ir'responsible government if the economically dependent (workers, women) had the same franchise as propertied men. But the battle was eventually won, with most women finally gaining a vote in the UK a century ago.[24]

Yet as to what 'universal' means in practice, there remain disagreements. Should citizens resident abroad vote, or should non-citizen permanent residents vote? Here there is

[21] J Rawls (edited by E Kelly), *Justice as Fairness: a Restatement* (Cambridge Mass., Harvard University Press, 2001) 138–39. In his earliest work on political finance, Ewing invoked Rawls to argue against political parties being dependent on wealthy interests: KD Ewing, *The Funding of Political Parties in Britain* (Cambridge, CUP, 1987) 175–76.

[22] Ewing, 'Jeremy Corbyn and the Law of Democracy' (n 3) 361–62.

[23] But compare J Rowbottom, 'Political Finance and the Constitution of Social Democracy' (ch 10), reasoning that there is limited room for a distinctly social democratic electoral law, given that this law must be primarily a procedural enterprise acceptable to a wide range of political perspectives.

[24] In 1918, albeit at a higher age than men: irrationally, given older women were more likely to be married/economically dependent. Full equality did not come about until the Representation of the People (Equal Franchise) Act 1928 (UK).

fundamental disagreement. To social democrats, there is a preferred answer. 'No' to expatriate voting, but yes to permanent residents.[25] This flows from the progressive idea of substantive interests, over liberal valorising of citizenship per se or a conservative idea of birthrights.[26]

So far, so good. There is in-principle agreement on the universality of the franchise, and a social democratic position on citizenship versus residency. But what of the obvious next question: is voting to be voluntary, or compulsory? Here, one might think social democrats would embrace compulsion. Compulsory turnout is a shibboleth of the centre-left in Australia, and compulsory enrolment likewise in New Zealand. Compulsion seeks to maximise voice and it may nudge policy towards more substantively egalitarian outcomes, say its proponents.[27] Yet such rules have not spread to other common law democracies. In the UK, compulsory turnout attracted some support from within the Labour Government in the mid-2000s, leading to a Ministry of Justice green paper canvassing a statutory 'duty' to vote but without any sanctions to enforce it.[28] But the proposal went nowhere. Of course inertia favours the status quo, but compulsory voting is a classic example of a fundamental issue where liberty and equality norms collide intractably.

ii. The 'Weight' of Each Vote

One-vote, one-value may seem to be a no-brainer today, as a correlative of a universal franchise. And yet … witness its long absence from the distribution of seats in Westminster, and the limited interest of social democrats in implementing it. It would be too easy to suggest that allowing smaller enrolments for 'regional' seats in the UK is a partisan redoubt (Labour being historically stronger in Wales and Scotland than the epicentre of southern England). There are principles at play as well. In contrast, for American progressives the fight has all been the other way. In 'easily the most important case in the [US] law of politics canon',[29] they won a strict one-vote, one-value rule by convincing the Supreme Court to imply it from the Bill of Rights and the '*equal protection* of the laws'.[30]

There are counter-arguments, from a different view of representation, that votes need not be weighted equally if power and wealth is disproportionately centred in one region. Take London and the 'home' counties of England, within the UK. Devolution may help

[25] G Orr, 'Citizenship, Interests, Community and Expression: Expatriate Voting in Australian Elections' in S Bronitt and K Rubenstein (eds), *Citizenship in a Post-National World: Australia and Europe Compared*, Law and Policy Papers (Sydney, Federation Press, 2008) 24.

[26] By this token prisoners should vote; but not all social democratic parties wish to expend political capital on a cause affecting a small minority and whose symbolism triggers socially conservative values. Despite a sizeable parliamentary majority for five years after the European Court of Human Rights ruled against UK prisoner disenfranchisement in *Hirst v UK* (No 2) (2006) 42 EHRR 41, the Labour Government kicked the issue into the long grass. Only 13 years later, under a Conservative Government, has reform partly harmonised the UK franchise with European rights law.

[27] J Brennan and L Hill, *Compulsory Voting: For and Against* (New York, CUP, 2014) especially ch 6.

[28] S Birch, 'The Case for Compulsory Voting' (2009) 16 *Public Policy Research* 21, 22.

[29] GE Charles and L Fuentes-Rohwer, 'Reynolds Revisited' in JA Douglas and ED Mazo (eds), *Election Law Stories* (St Paul, Foundation Press, 2016) 21, 57.

[30] US Constitution, 14th amendment. Emphasis added. See, eg, *Reynolds v Sims* 377 US 533 (1964) which was a challenge to gross malapportionment in Alabama. Chief Justice Warren, who led the court to adopt strict one-vote-one-value had curiously, in his earlier career as Governor of California, defended vote weighting for regional counties: Charles and Fuentes-Rohwer (n 29) 49–50.

redress the power imbalance amongst the nations of the UK, but the south of England remains wealthier than regions adjusting to the post-industrial economy, key constituencies for Labour's socio-economic project. One-vote, one-value is more than a mere a 'slogan or political catchcry' (as it was once dismissed by an Australian Chief Justice);[31] however it is not a universal principle. At different times and places conservatives *and* social democrats have recognised that equity of treatment and voice is not always the same as mathematical equality of votes. Does this suggest agreement over an underlying principle of substantive equality? Not necessarily. But what it does reveal is that even within an ideal like 'political equality', different notions of 'equality' exhibit strong tension.

iii. The Voting System

Here, there are a smorgasbord of models, each with profound differences for the degree of electoral choice and for the make-up of parliaments and government. To name just the three most prominent clusters of options in use, there are forms of proportional representation (PR), majoritarian run-offs (including the preferential or alternative vote (AV)), and the old stand-by of first-past-the-post or plurality voting. Even in countries with similar Westminster lower houses, common law and party systems, the room for principled difference is profound.

Given the chance in a referendum in 2010, the British Labour Party declined to embrace AV. Part of its reason was a preference for strong, responsible party government, an artefact of a view of popular sovereignty that is wary of bicameralism let alone coalition government.[32] Labour prefers to take its chances on the bipolar pendulum rather than risk further fracturing of the left-of-centre vote. Preferential voting, after all, was a system introduced in Australia to diminish the effect of any split in the conservative vote between parties of the right. But it is an article of faith on the left in Australia. Australia's most progressive Prime Minister since WW2 even went as far as to praise optional preferential voting, as the one system that allows electors to express indifference to options on the ballot.[33] Further abroad, in much of continental Europe, PR is seen as a necessary social democratic position, expressing the diversity principle of representation and reflecting a sense of the value of multi-party jostling and co-operation.

III. Political Finance: A Search for Norms

The most pressing electoral law question, for some decades, has been money in electoral politics.[34] This is the case across the 'developed' democracies. The area has proved febrile as regulators, legislators and courts shift between liberal, via egalitarian then onto integrity

[31] *Attorney-General v Commonwealth; ex parte McKinlay* (1975) 135 CLR 1, 17.
[32] Compare Ewing, 'Jeremy Corbyn and the Law of Democracy' (n 3).
[33] EG Whitlam, *The Whitlam Government 1972–1975* (Ringwood, Viking, 1985) 679.
[34] Money in politics is 'arguably the biggest threat to democracy worldwide' according to the Secretary-General of International IDEA: E Falguera et al (eds), *Funding of Political Parties and Election Campaigns: A Handbook of Political Finance* (Stockholm, IDEA, 2014) v.

positions, and back again. Here, then, is an area where we can divine no overarching theory or set of nested principles to direct regulation.

It is nigh on impossible to imagine consensus on aims between those who see democracy as about individual expression and those who see it as protecting collective interests, as the endless US debate makes clear. Perhaps this is unsurprising. As Anika Gauja explained in her search for international norms on the regulation of political parties:

> significant normative disagreements exist surrounding the desirability of parties as electoral actors, qualifications upon freedoms of association, the extent to which parties should be supported by the state, the nature of party competition, and the extent to which equality interferes with the freedoms of political expression and association (and vice versa).[35]

Her conclusion was that outside some quite minimal liberal principles – parties have a right to exist to contest elections – the search for consensus was fruitless.[36] Instead, '[d]etermining and defining the parameters of the debate, rather than advocating for a universal policy solution' was the role for any theoretical systematisation.[37] In similar fashion, International IDEA has avoided trying to define a theory for political finance regulation, since 'there is no form of democratic governance that is preferred everywhere'.[38] At best there are broad but competing goals that may express themselves differently in different political systems and contexts.

But can we diagnose a core, social democratic position on regulating money in electoral politics? We can, although it is partial rather than holistic and more an axiomatic tendency than a manifesto. This approach is guided by the sentiment, expressed by Ewing (above), that wealth in itself is corrosive of democracy. Money and monied interests put at risk the social democratic (and democratic socialist) promise of electoral democracy – equal respect and voice. To the social democrat the value of electoral democracy is as a counterbalance to a marketplace which, for all its dynamism and efficiency, is not built on humane values and reinscribes social and economic inequality

A. 'Party Finance': The Distinctive Ewingian Focus[39]

Political finance is the area of electoral law in which Keith Ewing has made his greatest contribution. It is no exaggeration to say he has been the most prolific and influential scholar in this area in the common law world beyond the US. His dedicated books include three research monographs and four edited volumes. Whilst his monographs focus on the

[35] A Gauja, 'The Legal Regulation of Political Parties: Is there a Global Normative Standard?' (2016) 15 *Election Law Journ*al 4, 4.

[36] Gauja (n 35) 17. Even then, militant liberals embrace rules banning parties that oppose the liberal democratic order: eg German Basic Law, Art 21(2).

[37] Gauja (n 35) 6.

[38] Falguera et al (eds) (n 34) 16.

[39] See also Rowbottom, 'Political Finance and the Constitution of Social Democracy' (n 23) on Ewing's account of money in politics as one based on the importance of pluralist competition between organised forces, especially parties, unions and corporations.

UK and Canada,[40] his edited works span Europe, north America and Australasia.[41] Here, by way of sample, are the essential elements of their titles: 'The Funding of Political Parties in Britain', 'The Funding of Political Parties: Europe and Beyond', 'The Challenge of Party Political Funding', 'Party Funding and Campaign Financing in International Perspective', 'Party Funding in Modern British Politics', 'The Funding of Political Parties'.

One thing shines from that list. In Ewing's framing, what others label 'political finance' or 'campaign finance' is, at root, a question of the fair and proper funding of *political parties*. This emphasis on party is pragmatically rooted in the idea of responsible party government. It would make less sense in a country like the US, with its directly elected chief executives and its candidate-centred primary elections. But it is also expresses an ideological variant of social democracy.[42]

Ewing's 'Political Party Finance – Themes in International Context' is instructive here.[43] It is not just a neat summation of the value of his 'party finance' orientation, it is as close to a generalised statement about the norms that ought shape, and methods that might manage, the regulation of money in politics, as anyone has given anywhere. On the all important normative side, Ewing lists three 'guiding principles':

> The first concern … is the need to ensure that parties have adequate funding. … The second concern is … to ensure that this occurs by means that do not expose them to the dangers of corruption and conflict of interest. … The third concern [is that] we need also to ensure there is fair competition between them.[44]

The last two concerns are familiar.[45] Anti-corruption or integrity concerns are shared even by a body as liberal as the US Supreme Court. 'Fair competition' can be parsed as a parity of arms conception of equality, where the focus of the parity is between parties as the chief agents within modern parliamentary government. Where, a liberal might ask, is 'liberty', the concern for electoral and expressive freedoms? Is its literal absence some blindness or malevolence on the part of social democracy? That would be odd, as the championing of civil liberties – including freedoms of political protest – in another strand of Ewing's work can attest.[46] Rather, Ewing's concern is not with individual electoral freedoms in the abstract.

[40] Ewing, *The Funding of Political Parties in Britain* (n 21), Ewing, *Money, Politics, and Law* (n 20) and Ewing, *The Cost of Democracy* (n 7).

[41] KD Ewing (ed), *The Funding of Political Parties: Europe and Beyond* (Bologna, CLUEB, 1999); KD Ewing and NS Ghaleigh (eds), *The Challenge of Party Political Funding: Comparative Perspectives* (Bologna, CLUEB, 2001); KD Ewing and S Issacharoff (eds), *Party Funding and Campaign Financing in International Perspective* (Oxford, Hart Publishing, 2006) and KD Ewing, J Rowbottom and J Tham (eds), *The Funding of Political Parties: Where Now?* (Abingdon, Routledge, 2012).

[42] 'We begin with the party …': Ewing, 'Jeremy Corbyn and the Law of Democracy' (n 3) 347 and following.

[43] K Ewing, 'Political Party Finance: Themes in International Context' in J Tham et al (eds), *Electoral Democracy: Australian Prospects* (Melbourne, MUP, 2011) 143.

[44] Ewing, 'Political Party Finance: Themes in International Context' (n 43) 147–49.

[45] Indeed under the headings 'institutional accountability' (of parties and donors) and 'fair rivalry' they were the heart of Ewing's analysis at the conclusion of *The Funding of Political Parties in Britain* (n 21) 178–87.

[46] See KD Ewing and W Finnie, *Civil Liberties in Scotland: Cases and Materials*, 2nd edn (Edinburgh, W Green & Son, 1988); K Ewing and C Gearty, *Freedom under Thatcher: Civil Liberties in Modern Britain* (Oxford, OUP, 1990); K Ewing and C Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914–1945* (Oxford, OUP, 2001); and KD Ewing, *Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law* (Oxford, OUP, 2010) especially ch 4 of the latter on 'Freedom of Assembly and the Right of Public Protest'.

It is with the ability for parties, as the collective voice of different interests, to participate in a roughly fair competition.

Having laid down three guiding 'principles', Ewing addresses the question 'how can we implement these principles?' He offers 'no single bullet', but a 'menu' of 'three dishes':

> The starter is transparency, which is now fully recognised as [a] prerequisite … The main course [consists of] contribution caps or spending limits. … [T]he sweet course [is] in the form of public or state funding.[47]

This summation of principles isn't just the work of a mature systematiser: it was echoed 20 years earlier in Ewing's book on Canadian political finance. (The one work, perhaps because it had a more north American audience, or perhaps because Canada was even then beginning to look at third parties, where the organising term was not 'party finance'.) In that book, we learn that 'the case for control [of money in politics] starts with the principle of political equality … at the heart of the system of government in the liberal democratic tradition'.[48]

This overarching principle – which is social democratic rather than liberal democratic, unless 'liberal' is inflected with a north American accent – itself comprises two foci. One on fair competition or 'the right of equal opportunity to secure election'; the other on 'equal representation'.[49] The fair competition or campaign principle involves ensuring three things. First that 'each of the candidates or parties representing major strands of opinion should have enough money to effectively fight an election [and] maintain an organization between elections'. (Note how candidates are mentioned, but the focus is still on parties as collective, organized interests). Second, that these players should 'have access to the major instruments of communication' (essentially the media). And third that 'no party or candidate should be permitted to spend more than its rivals by a disproportionate amount' (ie spending limits).[50]

The equal representation principle, for its part, combines integrity and fair government concerns. Again, Ewing breaks this down into a triad. First, electors should be encouraged to contribute, to reduce dependency on big donors (this is a nod to Canada's attempt to use tax credits to encourage small, citizen donations). Second, those who contribute should be accountable. In this, disclosure is key. Third, 'the influence of the economically powerful should be restricted by controlling the amount of money they contribute'. This seems to point to caps on donations. But, as we shall now see, donations by corporations and the rich are in the sights, rather than contributions from civil society groups like unions.[51]

B. Supply, Demand and Trade Union Money in Politics

Earlier we noted that, unlike classical liberals or libertarians, social democrats are concerned to restrain money in politics and to do this by law, rather than leave it to ethics or custom. Indeed, this might be a sine qua non or litmus test for social (electoral) democracy.

[47] Ewing, 'Political Party Finance: Themes in International Context' (n 43) 151–53. This typology is echoed in Falguera et al (eds) (n 34) 21–30.
[48] Ewing, *Money, Politics and Law* (n 20) 13.
[49] ~~Ibid~~, 14, 17.
[50] ~~Ibid~~, 17–18.
[51] ~~Ibid~~, (n 20) 22.

But a desire to restrain money is a vague principle, not a regulatory scheme. Amongst social democratic positions there are those, like Ewing, who focus on the demand side; that is, on expenditure limits. Then there are those who focus on the supply side; that is, on donation limits. The supply-siders include US progressives who, for over a century, have been concerned with busting the power of big corporations and cartels, and countervailing it with citizen-based action and contributions.

These different approaches can, in part, be rationalised as forms of path dependency, driven by concerns rooted in differing times and contexts. As early as 1883, the UK initiated expenditure limits – then on candidates – with good reason. The initiative was part of a wider war on electoral corruption, then emblemised by outright electoral bribery. In tamping down on expenditure, a broader aim was to relieve pressure on existing MPs and parties by reducing the arms' race. A happy by-product of this was making electoral contests more accessible to less well-to-do candidates. In contrast, under the pervasive influence of First Amendment doctrine and values, the concern in the US was to avoid industrial strength 'purchasing' of influence over legislators or directly elected executives. To this day, the UK has expenditure limits, but not donation caps; the US has the reverse.

Besides these factors, there have also been pragmatic arguments about the enforceability of donations limits and expenditure limits. Donations occur in private, and so are harder to monitor than campaign publicity, which rivals and regulators can monitor.[52] This administrative insight is, however, becoming less convincing as campaigning moves into the dark arts of targeted, online advocacy, including e-campaigning contracted via companies located offshore.[53] Money is fluid and slippery, whether being given or spent.

Beyond these national contexts and enforceability factors, there is a deeper question for social democrats. To the likes of Ewing, social democracy still very much means mobilising collective interests. This has chiefly been through labourism and a parliamentary party tied to the labour movement.[54] It follows then that social democracy may shoot itself in the foot if it caps all donations, since unions ensure the Labour Party survives during droughts in opposition and keep it tethered to its roots. Consistent with this vision, other scholars like Joo-Cheong Tham and Jacob Rowbottom – who Ewing has mentored – have argued in detail that the participatory and collective nature of unions distinguish them from business groups and for-profit corporations when it comes to making political contributions.[55] This is not to say that dependence on institutional donations (say from a small number of big unions) is not a risk: 30 years ago Ewing recognised the importance of transparency and membership approval of such contributions. But, in practice, that risk has reduced since the advent of a more corporate-friendly Labour Party in the last 20 years.[56] Above all, for Ewing, any significant cap on union contributions would be a deprivation of freedom of

[52] For other practical arguments against donation limits see Ewing, *The Funding of Political Parties in Britain* (n 21) 176–78.

[53] There is also the co-ordinated spending problem, where sympathetic groups or parties effectively magnify the spending limit for 'their' side of a campaign.

[54] KD Ewing, 'The Trade Union Question in British Political Funding' in Ewing, Rowbottom and Tham (eds), *The Funding of Political Parties: Where Now?* (n 41) 54 and Ewing, 'Jeremy Corbyn and the Law of Democracy' (n 3) 347–49.

[55] Tham (n 8) 108–19 and J Rowbottom, 'Institutional Donations to Political Parties' in Ewing, Rowbottom and Tham et al (eds), *The Funding of Political Parties: Where Now?* (n 41) 11.

[56] Ewing, *The Funding of Political Parties in Britain* (n 21) 173.

association. Not just in a practical sense by denying a key funding source but by rendering 'unlawful the existing constitutional structure of the Labour Party'.[57]

We should pause here, to note how Kahn-Freund's ideal of collective laissez-faire in labour relations has resonance for action in the electoral arena, where a self-reliant labour/Labour movement is pitted against more conservative antagonists.[58] This realisation can explain not just the rejection of supply-side, donation caps by British Labour, but also their absence in NZ and most of Australia.[59] Conversely, where parties of the centre-left are less enmeshed with the labour movement, as in Canada and the US, donation caps covering all types of donors (for-profit corporations, unions and other groups, and individuals alike) are staples of the regulatory menu. The idea of collective self-reliance can also explain why state support for political parties has not been a focus of social democratic reformers in the UK,[60] the way it has in Australia and continental Europe. In parts of those more statist jurisdictions, the bulk of party electioneering and even administrative costs are met from public funds.[61]

IV. Purpose as Function

So far, I have described the problems inherent in seeking to theorise any coherent, singular set of purposes for electoral law, where purpose is understood as normative aims. There is, of course, another way of understanding purpose, as function. Here I want to briefly sketch, and recommend, a functionalist conspectus of electoral law theories.

There are various functionalist approaches to law. The best known is Karl Llewellyn's 'law jobs' theory.[62] Llewellyn's concern was with the 'how' of law, which he dubbed 'juristic method'.[63] To him, the ultimate 'why' of the law revolved around settling disputes without

[57] KD Ewing, 'The Disclosure of Political Donations in Britain' in Ewing and Issacharoff (eds), *Party Funding and Campaign Financing* (n 41) 57, 75–76. See also Ewing, *The Funding of Political Parties in Britain* (n 21) 176 and Tham (n 8) 116–19. Even in despair with 'New Labour' and its reliance on big donors, Ewing opposed legislated caps on donations, offering instead the idea of parties setting 'their own limits [overseen] by the Electoral Commission': *The Cost of Democracy* (n 7) 248.

[58] Note here how Ewing's voluminous work on labour and trade union rights bleeds into his work on electoral law, meeting in the middle as early as KD Ewing, *Trade Unions, the Labour Party and the Law – a Study of the Trade Union Act 1913* (Edinburgh, Edinburgh University Press, 1982) and 'Trade Union Political Funds – the 1913 Act Revisited' (1984) 13 *Industrial Law Journal* 227.

[59] This can lead to regulatory stalemate, since conservative and liberal interests object to one-sided caps allowing union, but not business donations, as hypocritical or functionally unfair. As a halfway house, the Australian jurisdictions of New South Wales and Victoria cap all donations, but permit collective bodies like unions to join parties and pay fees based on the number of members they affiliate.

[60] Ewing, *The Funding of Political Parties in Britain* (n 21) 136 and 150 reasoned that 'arguments against public funding are powerful [but] not necessarily persuasive nor conclusive' and that '[i]f there is to be state aid' it should reflect electoral support. Such cautious consideration features in his later writing. So funding remains a 'vexed' idea, embraced simply as a way 'to fill at least part' of the gap between parties' needs and their ability to meet those from non-corrupting, fully disclosed private sources: *The Cost of Democracy* (n 7) 279.

[61] G Orr, 'Full Public Funding: Cleaning Up Parties or Parties Cleaning Up?' in J Mendilow and E Phélippeau (eds), *Handbook of Political Party Funding* (Northampton, Edward Elgar, 2018) 84.

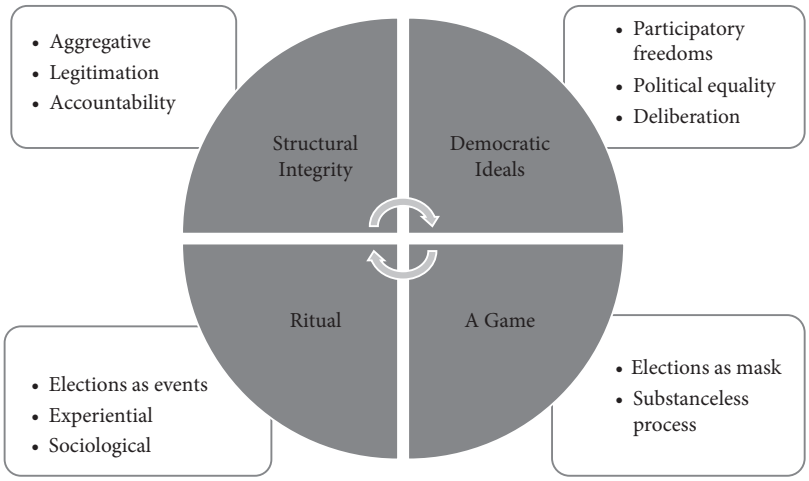
[62] Most comprehensively stated in K Llewellyn, 'The Normative, the Legal, and the Law-Jobs: the Problem of Juristic Method' (1940) 49 *Yale Law Journal* 1355.

[63] See the gloss by Llewellyn's academic biographer: W Twining, 'The Idea of Juristic Method: a Tribute to Karl Llewellyn' (1993) 48 *University of Miami Law Review* 119.

repressing human creativity or flourishing. In mentioning Llewellyn in a discussion of election law, I don't mean to invoke his concepts of juristic method or dispute settlement. As we saw at the start of this chapter, electoral law is not predominantly about litigation or the negotiation of conflict under the umbrella of the law. On the contrary, as a key element in the ordering of the political domain, it is a *precursor* to government and hence law-making and dispute resolution on substantive issues. Rather, I mean to invoke the simpler insight that the 'purpose' of a domain like electoral law can be considered in terms of the functions it might fulfil or fail to fulfil.

Here, in diagrammatic form, is my functionalist mapping of election law theory. Space precludes a lengthy summary,[64] but I will briefly explain the layout and grouping of concepts in turn.

Figure 9.1 A Typology of Election Law Theories



The top half of the diagram identifies the two most common, and instrumental, approaches to election law. The 'structural integrity' theme, at root, is captured in the old saying about electoral democracy being the least worst system of government. This conception is developed in Joseph Schumpeter's 'realist' account of electoral democracy as a realm of elites.[65] This is not an empty metaphor of politics as a mere mechanism to populate legislatures.[66] It encompasses the goal of fair elections in the fundamental sense of counting all the votes, and applying rules of the contest impartially. Independent electoral administration and law enforcement are critical, lest 'regulation [become] public deception'.[67] Ultimately it also encompasses elections as a crude accountability mechanism, where governments and

[64] See further Orr, *The Law of Politics* (n 8) ch 1 and G Orr, *Ritual and Rhythm in Electoral Systems: a Comparative Legal Perspective* (Farnham, Ashgate/Routledge, 2015) 6–10.

[65] J Schumpeter, *Capitalism, Socialism and Democracy*, 2nd edn (London, Allen & Unwin, 1947) chs 21–23.

[66] Though Green (n 9) is right to object to that instrumentalist caricature.

[67] M Mietzner, 'Indonesia' in P Norris and A Abel van Es (eds), *Checkbook Elections? Political Finance in Comparative Perspective* (New York, Oxford, 2016) 84, 84.

legislators are opened up to regular electoral judgment. In this conception, voting boils down to hiring and firing decisions as candidates and parties seek to gain or renew a mandate.[68]

This will still feel like a minimalist conception. To say our rulers are answerable to 'the people', rather than God, family or oligarchical backers, is a negative rule rather than a model of representation. But, in the course of human history, the ability to turnover those in power, bloodlessly yet without limiting the rulers to a bloodline, has proven a precious thing. This conception also then speaks to a variety of regulatory questions: stressing the importance of independent electoral authorities, access to the ballot and ballot box, the regularity of elections and laws to minimise the risk of quid quo pro corruption.

The top right of the diagram, in contrast, captures the more questing aims of electoral law in most democratic traditions.[69] These include the prominent normative purposes discussed earlier: political liberty and political equality. Without these two wings the bird won't fly. But there is tension not only between those two purposes, but within them. There are different approaches to liberty (collective or individual), and to equality (formal or substantive, and party, interest group or candidate centred). There are also other liberal values which have tended to be sublimated. The most obvious is good deliberation: to what extent can electoral law and processes improve the quality of debate and information?[70] Realists, for their part, do not reject these values but see them as 'romantic', 'folk theories' that can obscure as much as they limit the power of elites.[71]

These two approaches – the structural integrity and the liberal democratic – both express several teleological aims. Unsurprisingly, they have played an explicit role in shaping the law. But there is a third view which sees electoral democracy as, in a sense, an end in itself. This, as I've explained elsewhere, is the conception of elections as rituals.[72] Not rituals in the empty sense, but in the everyday sense in which any patterned, recurrent and meaningful human activity is lived out. In this more sociological approach, however we stage elections under law we should be cognisant of the symbols and experiences that are generated. Should we, for instance, vote in schools or government buildings, and on a single polling day or across weeks? These questions can be analysed in terms of instrumental goals (maximising turnout for the sake of legitimacy and participation). But they also need to be understood as choices that shape the social experience and understanding of an election as the one occasion that truly brings together a secular society.

Finally, in the bottom right quadrant, lies the realm of the deep sceptic. In this view, elections are just a game, in the hollow sense of the word. This approach differs from the other three, which each assume a commitment to the enterprise, whilst differing in

[68] J Buchler, *Hiring and Firing Officials: Rethinking the Purpose of Elections* (New York, OUP, 2011).

[69] Compare A Geddis, 'Three Conceptions of the Electoral Moment' (2003) 28 *Australian Journal of Legal Philosophy* 53, discussing 'liberation', 'egalitarian' and 'deliberation' as core values for election law. Any theory of electoral authoritarianism (if that is not an oxymoron) belongs elsewhere.

[70] See R Levy and G Orr, *The Law of Deliberative Democracy* (Abingdon, Routledge, 2016). Contrast J Gardner, *What are Campaigns For? The Role of Persuasion in Electoral Law and Politics* (New York, OUP, 2009), arguing that elections are irredeemably agonistic and that, in the US at least, the law ought just focus on getting the aggregative dimension, of letting everyone vote and counting each vote, right.

[71] CH Achen and LM Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsive Government* (Princeton, Princeton University Press 2016).

[72] Orr, *Ritual and Rhythm in Electoral Systems* (n 64). See further S Coleman, *How Voters Feel* (Cambridge, CUP, 2013).

their portrayal of the 'jobs' that elections perform. By contrast, in the 'it's a game' view, paying too much heed to building good electoral institutions and laws risks obscuring the possibility that elections function as a mask. This sentiment is most easily distilled in the catchcries 'whoever you vote for a politician always wins' and 'if voting changed anything, it would be illegal'. Variants of those slogans have been attributed to everyone from political activists to the literary wag Mark Twain. Long usage of such sayings, without obvious source, attest to their popularity. Less cynical are critiques that nuance satirical detachment with commitment to alternatives to liberal democracy. Most obviously are Marxism and anarchism. Emblematic of this is Emma Goldman's essay doubting the value of suffragism: 'Our modern fetich [sic] is universal suffrage. … Woe to the heretic who dare question that divinity!'[73] Market-oriented libertarians, also deeply sceptical of government, sometimes also echo this view.

There is even a related strand of neo-conservative thought, which doubts the value of elections precisely because electoral law is concerned with (hollow) proceduralism. Thus, in Irving Kristol's account, elections are games that we manage in the name of legitimising a self-perpetuating system:

> Democracy is a "political system" … reduced to its mechanical arrangements … nothing but a set of rules and procedures whereby majority rule and minority rights are reconciled.[74]

In other words, liberal electoral democracy lacks a conception of the good, or any sense of virtue or character, values required to avoid politics becoming the terrain of self-serving apparatchiks. Democratic socialists would not completely disagree. After all, equal dignity and respect are hardly to be achieved if electoral democracy boils down to a utilitarian calculus where everyone votes in their own interest. If that happens, electoral outcomes may be procedurally utilitarian, but substantively unfair for vast numbers. Ultimately, the outsider critique of elections as a game is of little use to regulators. But it serves as a reminder that democracy cannot be reduced to the rules of electoral democracy. To a social democrat, industrial democracy for instance is no less a constitutional value than parliamentary democracy.

V. In Conclusion

To explore any area of law in the hope of finding a 'theory' for it, in the sense of a set of guiding principles, is heroic. At a generous level of generality, some regulatory domains can be captured in a succinct set of aims in search of a balance. So environmental law has a grundnorm of sustainability, within which it juggles deep-green or precautionary principles with approaches which give more weight to human demands. The essence of taxation law can be captured in the need to collect public revenues to address social aims like redistribution and promoting desirable activity, without strangling economic incentive. Labour law,

[73] E Goldman, 'Woman Suffrage' in *Anarchism and Other Essays*, 2nd edn (New York, Mother Earth Publishing Association, 1911) 201.

[74] I Kristol, *Reflections of a Neo-Conservative: Looking Back, Looking Ahead* (New York, Basic Books, 1983) 50–51.

for its part, has existed in a state of perpetual tension between its governing ideal of protecting employees and wider economic forces. In recent times its scope has been stretched, almost unrecognisably, into an inter-connected 'law of work', paid and unpaid.[75] (Others in this volume will seek to redefine a protective and social democratic vocation for labour law amongst the complexities of twenty-first century.)

Why then can't a seemingly niche domain like electoral law be so neatly contained? We began by noting that electoral law has been under-theorised, and asking if it were possible to synthesise a set of normative purposes to guide it. The answer is 'perhaps': try political liberty, equality and deliberation. But the tension between those norms is often irreconcilable and, expressed with such generality, concepts like political 'liberty' and 'equality' are indeterminate. Ultimately, the contested nature of representative democracy ensures we will struggle to find any nested set of normative guidelines to guide electoral law. This is the case even allowing for different political contexts. Yes, principles may express themselves in different answers to the same question across different historical and social contexts (hence shifts in the minimum voting age for instance). But context cannot explain away more basic differences (say over voluntary versus compulsory voting, or over the role of money in politics).

All is not normative randomness however. Social democrats share a conception of electoral democracy that can guide reform in that mould – even allowing that, within social democratic theory, we see distinctive inflections of the principle of social equality and the collective nature of society. A good example of that is Ewing's work on money in politics, with its framing of the law around 'party funding', recognising the desirability of a certain parliamentary and party system and emphasising labourism.

Electoral law is special in that it is constitutive, of the politics and governments that in turn create law in other, more substantive domains.

> The key insight of election law is that laws regulating the political process are not "neutral" … Politics is therefore a "game" – not in the sense that its outcomes are trivial, but in a sense that the winners and losers are determined by the strategic decisions and actions taken within … a system of rules. Election law is about the creation and implementation of those rules.[76]

To social democrats and conservatives alike, this is not something to be lamented. The design of the law is less a search for platonic ideals and more a contest of values and worldviews. In other words, there is no 'theory'; rather there is a variety of clashing, normative theories. Ewing's contribution stands unashamedly in this tradition. He advances a particular, pragmatic version of a social democratic view of politics and constitutionalism. As Jacob Rowbottom observes, his approach is 'consistent with social democratic values' in seeking 'to ensure that political rights can be exercised in practice and are not dependent on levels of wealth' but 'does not seek to re-design the system [but rather] defends the

[75] Eg, R Owens and J Riley, *The Law of Work* (South Melbourne, OUP, 2007). And see how shifts in nomenclature, from 'master and servant', through 'industrial' and 'labour', onto 'employment' and 'workplace relations' law embody these ideological and disciplinary shifts: G Orr, 'The Fair Work Act and other Names of Shame' (2009) 16 *Australian Journal of Administrative Law* 74.

[76] Dimino et al (n 6) [preface]. Compare D Rae, *The Political Consequences of Electoral Laws* (New Haven, Yale University Press, 1967).

existing institutions as providing a rough approximation to an inclusive system that best fits [his country's] political history.'[77]

To appreciate that there is ~~not~~ overarching 'theory' of electoral law does not, however, condemn us to conceptual chaos. In a contested domain like electoral law, theory can play a systematic role by setting a framework for debate. The value of this approach is to set parameters for discussion and to help frame syntheses, critiques or reform proposals about the law, both in academia and policy-making. This is where a functionalist typology, like the one I have offered, fits in. Being taxonomic, a functional approach need not weigh-in on normative disputes between different social democratic or libertarian traditions. Its weakness is that its dispassion can seem rudderless or anti-theoretical, like the 'garbage can' theory of mixed or pluralist jurisprudence.[78] But without some parameters, debates are likely to become blinded to the variety of questions in play, or worse, mired in particularities and pure partisanship.

[77] Rowbottom, 'Political Finance and the Constitution of Social Democracy' (n 23).
[78] Criticism levelled, eg, at C Sampford, *The Disorder of Law: a Critique of Legal Theory* (Oxford, Blackwell, 1989).